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November 3, 2023

VIA ECF

Hon. John G. Koeltl
United States District Court Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: ***D. George Sweigert v. Jason Goodman, et al.*, Case No.: 23-CV-05875**

Dear Judge Koeltl,

We represent defendant X Corp., as successor in interest to named defendant Twitter, Inc. ("X Corp."), in the above-captioned action. Pursuant to Your Honor's Individual Rule of Practice II.B, X Corp. respectfully submits this letter requesting a pre-motion conference and/or leave to file a motion to dismiss plaintiff D. George Sweigert's ("Plaintiff") complaint under Federal Rule of Civil Procedure 12(b)(6) on the bases described below. X Corp. also respectfully requests that this Court stay the November 7, 2023 deadline for X Corp. to respond to the complaint until this pre-motion submission is addressed.

Plaintiff alleges he has been repeatedly defamed by defendant John Goodman, who allegedly posts content to various social media platforms, including Twitter.[1] Compl. ¶¶ 3–4. According to Plaintiff, Goodman has had several accounts suspended from Twitter for violating X Corp.'s Terms of Service. *Id.* ¶ 27. Plaintiff alleges Goodman circumvents these suspensions by creating new Twitter accounts, through which he allegedly posts slanderous and defamatory content about Plaintiff. *Id.* ¶¶ 49–54. Plaintiff contends X Corp. inconsistently enforces its Terms of Service, knows that Goodman is evading its ban, and should be held vicariously liable for Goodman's alleged torts. *Id.* ¶¶ 2, 30–31.

If granted leave to file a motion to dismiss, X Corp. intends to argue that Plaintiff's complaint should be dismissed under Rule 12(b)(6) for failure to state a claim, for three reasons:

First, X Corp. is immune from liability for Plaintiff's claims under Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230 ("Section 230"). Section 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230(e)(3) provides, aside from exceptions not relevant here, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is

[1] Twitter, the online social media platform, has been re-branded as "X." This brief refers to "Twitter" when referring to the platform, and to the company as "X Corp."

inconsistent with this section." Section 230(c)(1) provides immunity where: (1) the defendant is a provider of an "interactive computer service," (2) the claim is based on "information provided by another information content provider," and (3) the claim would treat the defendant as the "publisher or speaker" of that information. *Fed. Trade Com'n v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (internal citations and quotations omitted). Here, all three elements are met:

1. X Corp., via the Twitter platform, is a provider of an "interactive computer service." *See, e.g.*, *Brikman v. Twitter, Inc.*, No. 19CV5143RPKCLP, 20202 WL 5594637, at *2 (E.D.N.Y. Sept. 17, 2020) (X Corp. "qualifies as an interactive computer service" provider); *Morton v. Twitter, Inc.*, No. CV 20-10434-GW-JEMX, 2021 WL 1181753, at *3 (C.D. Cal. Feb. 19, 2021) (X Corp. "provides the prototypical service entitling it to protections of [Section 230]" and [e]very decision the Court has seen to consider the issue has treated [X Corp.] as an interactive computer service provider, even at the motion to dismiss stage.") (internal quotation marks and citation omitted).

2. Plaintiff's claims are based on his allegations that X Corp. hosts Twitter content allegedly posted by another user, Jason Goodman, *i.e.*, "information provided by another information content provider." *See LeadClick Media, LLC*, 838 F.3d at 174 (an "'[i]nformation content provider' is defined to include 'any person or entity that is responsible, in whole or in part, for the creation . . .' of the content at issue "); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 590 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019) ("The second element of immunity under Section 230(c) is satisfied because [plaintiff's] . . . claims are all based on content provided by another user[.]").

3. Plaintiff's claims seek to impose liability on X Corp. for its alleged moderation decisions about Goodman's allegedly defamatory Twitter content, precisely the type of publishing activity that Section 230 was designed to immunize. *See Ricci v. Teamsters Union Loc. 456*, 781 F.3d 25, 28 (2d Cir. 2015) (in passing Section 230, "Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.") (quoting *Zeran v. Am. Online, Inc.*, 129 F. 3d 327, 330–31 (4th Cir. 1997)); *see also Herrick*, 306 F. Supp. 3d at 590 ("publishing includes any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online") (internal quotation marks and citations omitted); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 157 (E.D.N.Y. 2017), *aff'd in part, dismissed in part sub nom. Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019) ("[C]hoices as to who may use [a provider's] platform are inherently bound up in its decisions as to what may be said on its platform, and so liability [therefrom] . . . would equally 'derive[ ] from [the provider's] status or conduct as a 'publisher or speaker.'") (citing *LeadClick Media*, 838 F.3d at 175).

Thus, Section 230 provides X Corp. immunity from Plaintiff's claims and they should be dismissed.

Second, Plaintiff's claims are barred by the First Amendment, which protects X Corp.'s editorial decisions about what speech it allows to be disseminated on its platform and who may make that speech. *See Volokh v. James*, No. 22-CV-10195 (ALC), 2023 WL 1991435 at *6 (S.D.N.Y. Feb.

14, 2023) (social media platform providers "have an editorial right to keep certain information off their websites and to make decisions as to the sort of community they would like to foster on their platforms"); *see also O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1186-88 (N.D. Cal. 2022) (dismissing on First Amendment grounds claims based in part on Twitter's permanent suspension of a user's account), *aff'd on other grounds sub nom. O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023).[2]

Third, Plaintiff fails to plausibly allege any claim.[3] To the extent Plaintiff seeks to hold X Corp. vicariously liable for defendant Goodman's allegedly tortious conduct, the claim fails because Plaintiff has not alleged facts that would plausibly allege X Corp. acted through Goodman or that Goodman is X Corp.'s agent, such that it could be held responsible for Goodman's acts. To the extent Plaintiff attempts to assert a breach of contract claim, the claim fails because Twitter's Terms of Service, the only contract between X Corp. and Plaintiff, do not obligate X Corp. to suspend users who violate the Terms, and it is axiomatic that "[a] plaintiff cannot predicate a breach of contract claim on a defendant's terms of service where those terms did not commit the defendant to performing any particular action." *Joude v. WordPress Found.*, C 14-01656, 2014 WL 3107441, at *5 (N.D. Cal. July 3, 2014). And to the extent Plaintiff is attempting to assert a claim for promissory estoppel, that claim fails because Plaintiff does not allege X Corp. made "a clear and unambiguous promise" to him, much less that he relied reasonably and to his detriment on such a promise. *Jones v. Wachovia Bank*, 230 Cal. App. 4th 935, 945 (2014) (articulating elements to state a claim for promissory estoppel); *Lloyd v. Facebook, Inc.*, 2022 WL 4913347, at *9 (N.D. Cal. Oct. 3, 2022) ("[M]erely stating that Facebook does not allow users to post harmful content and that they will remove them [sic] is . . . a general monitoring policy that . . . was insufficient [to sustain a claim for breach of contract or promissory estoppel].").

For these reasons, X Corp. respectfully requests a pre-motion conference and/or leave to file a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), as well as a stay of its November 7, 2023 deadline pending the Court's consideration of this letter-motion.

Sincerely,
/s/ Kenneth M. Trujillo-Jamison
Kenneth M. Trujillo-Jamison (motion for *pro hac vice* pending)
Attorneys for Defendant X Corp., as successor in interest to named defendant Twitter, Inc.

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[2] In affirming *Padilla*, the Ninth Circuit acknowledged that "[w]hether social media companies' content-moderation decisions are constitutionally protected exercises of editorial judgment has divided [its] sister circuits recently," and did not reach the issue on appeal. 62 F.4th at 1156 n.1 (citing *NetChoice , LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022), *certiorari granted in part by Moody v. Netchoice, LLC*, 2023 WL 6319654 (Mem), No. 22-277 (U.S. Sept. 29, 2023); and *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *certiorari granted in part by NetChoice, LLC v. Paxton*, 2023 WL 6319650 (Mem), No. 22-555 (U.S. Sept. 29, 2023)).

[3] The Terms provide that "[t]he laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and Twitter." Therefore, Plaintiff's claims should be analyzed under California law.